BENSON-MONTIN-GREER DRILLING CORP.

v.

ACTING ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-38-A Decided December 18, 1991

Appeal from a determination that three tribal oil and gas leases had expired by their own terms because of failure to produce oil and/or gas in paying quantities.

Affirmed.

1. Indians: Leases and Permits: Generally--Indians: Leases and Permits: Cancellation or Revocation--Indians: Mineral Resources: Oil and Gas: Generally

A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. The expiration occurs under the terms of the statute, not under any rule or regulation of the Department of the Interior.

3. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

Any test for "production in paying quantities" sought to be applied to an oil and gas lease of Indian land must be analyzed in context to ensure that there is no conflict with overriding principles of Federal Indian law.

APPEARANCES: R. Charles Gentry, Esq., Austin, Texas, for appellant; Robert C. Eaton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Area Director; Wayne H. Bladh, Esq., Santa Fe, New Mexico, for the Jicarilla Apache Tribe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Benson-Montin-Greer Drilling Corporation seeks review of a December 14, 1990, decision of the Acting Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that Jicarilla Apache Tribal Oil and Gas Leases 200, 403, and 408 (leases 200, 403, and 408) had expired by their own terms because of failure to produce in paying quantities. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is present assignee of leases 403 and 408 and assignee of operating rights under lease 200, all issued under authority of the Indian

Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396f (1988). 1/ The three leases cover a total of approximately 6,600 acres of tribal land in T. 27 N., R. 1 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico, on the Jicarilla Apache Reservation. The lease term for each lease is "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." All three leases are in their extended terms.

Appellant also has interests in leases of Federal land in the Canada Ojitos Unit, which adjoins the tribal leases. Appellant has sought since about 1980 to have the tribal leases added to the unit. The Jicarilla Apache Tribe (Tribe), however, has not consented to the unitization of its leases. 2/

On July 1, 1986, appellant applied to the Bureau of Land Management (BLM) for permission to vent gas from the wells on the tribal leases, on the grounds that marketing the gas would be uneconomic and that, once the leases

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1/ Lease 200 was approved by BIA on June 12, 1957, with Honolulu Oil Corporation as lessee; on Feb. 9, 1968, BIA approved assignment of operating rights under lease 200 to appellant. Lease 403 was approved by BIA on Jan. 12, 1968, with Tom Bolack as lessee; on Sept. 9, 1977, BIA approved assignment of lease 403 to appellant. Lease 408 was approved by BIA on Dec. 18, 1967, with James C. Vandiver as lessee; on Jan. 23, 1976, BIA approved assignment of lease 408 to appellant.

2/ Under 25 CFR 211.21(b), tribal consent is required before tribal leases may be included in a unit. This section provides:

"All such [tribal oil and gas] leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected."

were added to the Canada Ojitos Unit, the gas could be gathered through the unit's gas gathering system. BLM approved the application for 1 year. 3/ Appellant reapplied and was approved on an annual basis during succeeding years. In 1990, appellant's application to vent gas was approved "until the market conditions or the regulations change." March 15, 1990, BLM letter to appellant.

In June 1989, the Area Director requested BLM to make "paying-well" determinations as to the three leases, as well as Jicarilla Tribal Oil and Gas Lease 404, not at issue in this appeal. The Area Director apparently requested that the determination be made for the period January through May 1989. BLM sought information from appellant for the purposes of making this determination. 4/ By memorandum of August 18, 1989, BLM advised the Area Director that it had studied the leases over a 2-year period, January 1987

3/ BLM approval is indicated by a stamp on appellant's letter of application. A handwritten note on the letter reads: "Must pay royalties, Approved until 7/2/87, BIA Dulce."

Appellant's 1986 application stated that it had been venting gas since 1984, apparently without approval. There is an indication elsewhere in the record that the 1986 BLM approval included retroactive approval of the earlier venting, but this is far from clear.

4/ No copy of the BIA request to BLM is included in the administrative record. However, in apparent reaction to the BIA request, BLM sought information from appellant concerning the period January through May 1989. Appellant's response indicated that it did not believe paying-well determinations could be made "from the operating history of a few randomly selected months; so we are submitting information covering a longer, and more representative, time period - two years, being calendar years 1987 and 1988" (Appellant's July 28, 1989, Letter to BLM at 1).

An attachment to appellant's letter showed that, during the period January through May 1989, lease 200 produced for 4 days, lease 403 produced for 0 days, and lease 408 produced for 3 days. Appellant contended: "Clearly production for those months is not representative of either the wells' abilities to produce nor their actual production rates over extended time periods. Analyses for paying well determinations for this (January through May) time period would be grossly in error" (Attachment 2 to appellant's July 28, 1989, letter).

through December 1988, and found that the wells on leases 200, 403, and 404 were producing in paying quantities but that the well on lease 408 was not.

By three letters dated June 21, 1990, the Superintendent, Jicarilla Agency, BIA, advised appellant that leases 200, 403, and 408 had expired by their own terms. The letters stated that production records showed no commercial production for lease 200 since July 1989, for lease 403 since October 1989, and for lease 408 since July 1986.

Appellant appealed these letters to the Area Director. While the appeal was pending, BLM conducted a paying-well determination for leases 200 and 403 for the period January 1, 1989 through December 31, 1989. 5/

5/ It is not clear what prompted this action by BLM. However, by memorandum of July 23, 1990, the Area Director had sought a BLM State Director's review of BLM's earlier paying-well determinations. The Area Director expressed dissatisfaction with the manner in which BLM had handled the determinations. He stated in part:

"In calculating the production in paying quantities, if the operator shuts in a well and only produces said well for a couple of days per year, he could easily make enough production to pay his operating cost because he has minimal costs associated with a shut in well. * * * The BLM continues to allow [appellant] to shut the wells in and say that [it] has production in paying quantities. The Tribe received $3,000 from this lease instead of $14,000 if [appellant] would have produced the wells each month for the 24 months of the paying well determination study.

* * * * * * *

"When a producing well determination is requested, we are asking that you not only look at the information submitted by the operator and act in the operator's interest but that you fulfill your fiduciary responsibility and give a determination that is in the best interest of the Indians. If during the paying well determination BLM finds that the operator has shut the well in for extended periods of time with no approval, we would ask that instead of telling the operator that his leases are in good standing that you provide the BIA with a recommendation that the leases have expired under their own terms."

(Area Director's July 23, 1990, memorandum at 1-2).

By memorandum of August 31, 1990, BLM reported: "A negative net income of $-436.00 was obtained for [lease 200], which, in our view is uneconomic (marginally). Therefore, [lease 200] does not have a well on the lease producing in paying quantities." (Emphasis in original.) The memorandum does not report any determination with respect to lease 403.

In a decision issued on December 14, 1990, the Area Director stated:

> The facts of this case clearly indicate that there was no commercial production from the leases during the following periods:
>
> | Lease | No Production Months |
> | --- | --- |
> | Jicarilla 200 | February, March, April, and November 1987.
January, February, March, July, August, October, November and December 1988. |
> | Jicarilla 403 | January, February, March, April, May, June, July, and September 1987.
January, February, April, July, August, October, November, and December 1988. |
> | Jicarilla 408 | January, February, March, April, May, June, July, August, September, October, November, and December 1987.
January, February, March, April, May, June, July, August, September, November, and December 1988. |

Although identifying periods of non-production different from those identified by the Superintendent, the Area Director affirmed the Superintendent's determinations that the leases had expired because of failure to produce oil and/or gas in paying quantities. The Area Director relied explicitly on the Board's decision in Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 97 I.D. 215 (1990).

Appellant's notice of appeal from the Area Director's decision was received by the Board on January 11, 1991. Appellant, the Area Director, and the Tribe filed briefs.

Discussion and Conclusions

Appellant argues: (1) the agency should have afforded appellant a hearing under 25 CFR 211.27 before cancelling its leases; (2) BIA's requirement of "continuous" production in the extended term of a lease is an invalid, unpublished rule; (3) Mobil was incorrectly decided; (4) whether production in paying quantities has been achieved should be determined in accordance with principles from state and Federal case law concerning oil and gas leasing of non-Indian lands; and (5) "continuous" production would be of no additional benefit to the Tribe.

The Area Director and the Tribe argue, inter alia, that this case is controlled by Mobil. Further, they argue, Mobil was correctly decided and should not be disturbed.

[1] With respect to appellant's first argument, Mobil is only one of several decisions in which the Board has stated that no "cancellation" occurs when BIA determines that an oil and gas lease has expired by its own terms. The Board has consistently held that BIA is not required to follow the cancellation procedures in 25 CFR 211.27 in these circumstances. See, e.g., Duncan Oil, Inc. v. Acting Navajo Area Director, 20 IBIA 131, 137 (1991); Mobil, 18 IBIA at 323, 97 I.D. at 219; Bekco Oil & Gas Corp. v.

Acting Muskogee Area Director, 18 IBIA 202, 204 (1990). Appellant has failed to show that the Board's prior holdings on this point are in error. Its first argument is therefore rejected.

[2] Appellant's second argument is also rejected. As discussed at length in Mobil, 18 IBIA at 322-26, 97 I.D. at 219-21, the "rule" that a lease of Indian land in its extended term expires upon cessation of production is a self-executing statutory rule, derived from the IMLA. Insofar as officials of the Department of the Interior have undertaken to interpret this provision of the statute, they have done so through issuance of a legal opinion and through adjudications, rather than through rulemaking. See further discussion below. In short, it is not by any rule of the Department of the Interior, valid or invalid, that leases expire upon cessation of production but, rather, by operation of the statute. 6/

Appellant's principal argument is that Mobil was incorrectly decided. Appellant contends that

> [m]ost jurisdictions that have addressed the proper determination of "production in paying quantities" have now adopted what is effectively a two-pronged test. First, they apply as an objective standard a mathematical calculation of profitability, meaning revenue sufficient to repay costs of operation and marketing and produce a profit, however slight. * * * Second, and only if profit is not found by the objective test, a subjective standard is then

6/ The appellant in Mobil made a somewhat different argument that an invalid rule had been promulgated. Mobil contended that the Superintendent, Southern Ute Agency, announced a rule of his own devising when he stated that "production in paying quantities is judged on a monthly cycle." The Board found that the Superintendent's statement was not a rule and that even if error, it was harmless error under the circumstances. 18 IBIA at 333, 97 I.D. at 224.

> used to determine whether a prudent operator would continue to operate the lease for a profit and not for mere speculative purposes. [Emphasis in original.]

(Appellant's Opening Brief at 16-17).

Appellant concedes that lease 408 fails to meet the objective portion of the test which it urges the Board to adopt; it contends, however, that the "legitimate prospect of unitization which would include this Lease fully satisfies the subjective portion of the test" (Appellant's opening Brief at 21). Lease 403, appellant contends, meets the objective portion of the test, and lease 200 is "very close to being profitable," even under BLM's paying-well analysis, which appellant contends is flawed because only one year was studied 7/ (Appellant's Opening Brief at 20).

[3] In Mobil, the Board discussed the principles of Federal Indian law which preclude the mechanical application to Indian oil and gas leases of rules developed for non-Indian oil and gas leases. 18 IBIA at 323-31, 97 I.D. at 219-23. Under that decision, any tests for paying quantities, such as those advocated by appellant, would require analysis, in the context in which they are sought to be applied, to ensure that there is no conflict with the overriding principles of Federal law governing oil and gas leases of Indian land.

7/ Appellant appears to be referring here to BLM's second paying-well determination, which concerned 1989. In fact, for 1987 and 1988, the years at issue in this appeal, BLM determined that lease 200 was producing in paying quantities.

Appellant contends that a 1-year period is too short a period in which to determine whether a well is producing in paying quantities.

Appellant's position appears to be that these principles must give way if they appear at all inconsistent with the tests it advocates. Certainly, appellant makes no attempt to demonstrate that its position may be squared with Mobil but, instead, bluntly urges the Board to reverse that decision. Nothing in appellant's argument, however, persuades the Board that its holding in Mobil was erroneous.

Appellant further contends that, even if Mobil was correctly decided, its holding should not be applied to existing leases because it is a newly announced rule. Contrary to appellant's contention, Mobil did not announce either a new "rule" or a new interpretation of the IMLA. Rather, it relied upon and essentially reaffirmed a Department of the Interior Solicitor's Opinion published in Interior Decisions in 1942. See 18 IBIA at 324, 97 I.D. at 219-20, 58 I.D. 12 (1942). The holding in Mobil is consistent with the legal position taken by the Department of the Interior for at least the last 49 years. See, e.g., Administrative Appeal of Continental Oil Co., 2 IBIA 116, 80 I.D. 786 (1973); The Superior Oil Co. & The British-American Oil Producing Co., 64 I.D. 49 (1957). 8/ The Board finds that Mobil is applicable to appellant's leases.

8/ In Superior Oil Co., the Assistant Secretary of the Interior held, as did this Board in Mobil, that a provision contained in the statute and regulations governing leasing of public lands, but absent from the statute and regulations governing leasing of Indian lands, could not be invoked to extend a lease of Indian lands. 64 I.D. at 51. The provision at issue in Superior was one authorizing the Secretary to approve suspensions of operations.

An apparent aberration from this line of authority is an Interior Board of Land Appeals (IBLA) decision cited by appellant. In Hoover & Bracken Energies, Inc., 71 IBIA 220 (1983), IBLA reviewed a 1979 decision of the Acting Deputy Commissioner of Indian Affairs concerning expiration of an oil and gas lease of Indian land. (Apparently, between 1975 and 1981, IBLA and this Board shared jurisdiction over appeals of this nature. Cf. 43 CFR

In Mobil, there was no factual dispute concerning production; Mobil conceded that its leases had not produced for a period of at least 6 months. 18 IBIA at 322, 97 I.D. at 218. Here, appellant contends that leases 200 and 403 were producing in paying quantities during 1987 and 1988.

The record contains three sources of information concerning production and/or sales from the leases during 1987 and 1988. The first is the Tribe's tax ledger for appellant's leases, showing production for each month as reported by appellant. The second is a Minerals Management Service (MMS) report titled "Royalty Management Program, State and Tribal Support System, Royalty Details History - Lease, Sales Date, Revenue Source." The MMS reports show sales quantities for each month during 1987 and 1988, as reported to MMS by appellant. The third source is a report of monthly production which was provided by appellant to BLM pursuant to BLM's June 1989 request for information upon which to base a paying-well determination. 9/

Under the Tribe's Oil and Gas Severance Tax Ordinance and Oil and Gas Privilege Tax Ordinance, operators are required to report production for each month. As to each tax, tribal law provides:

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fn. 8 (continued)
4.351 (1980) with 43 CFR 4.330 (1981).) Hoover & Bracken is, however, of limited authority because it analyzed the issue before it under the wrong statutory provisions, i.e., 30 U.S.C. § 226(f) and (j) (1976), which apply to public lands but not to Indian lands. In fact, the decision fails even to mention the statutes governing oil and gas leasing of Indian lands. As discussed in both Mobil and Superior, there are significant differences between the statutes governing oil and gas leasing of public lands and those governing oil and gas leasing of Indian lands. 18 IBIA at 323-26, 97 I.D. at 219-21, 64 I.D. at 51.

9/ There is also a BLM report covering part of the period at issue here. The figures in the BLM report are identical to the figures in appellant's 1989 report to BLM.

> Within forty-five (45) days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas, and condensate and BTU of gas produced from each well on Tribal lands for such calendar month and the amount of tax due.

Jicarilla Apache Tribal Code, Title 11, Chapter 1, section 6, and Chapter 2, section 5. The General Instructions to operators state that "[e]ach operator must report <u>all</u> of his production each month." (Emphasis in original.)

Under 30 CFR Part 210, sales must be reported to MMS. 30 CFR 210.52 provides: "A completed Report of Sales and Royalty Remittance (Form MMS-2014) must accompany all payments to MMS for royalties * * * Completed Form MMS-2014's * * *are due by the end of the month following the production month." <u>10</u>/

The Board recognizes that sales data for a given month is not necessarily an accurate reflection of production for that month. In this case, however, according to appellant's production reports to the Tribe and its sales reports to MMS, production and sales were identical for each month

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<u>10</u>/ Under MMS regulations promulgated in 1986, now 30 CFR Part 216, operators must also make reports of production to MMS. Operators were made subject to this requirement as they were individually notified by MMS. <u>See</u> 30 CFR 216.20. It is the Board's understanding that appellant became subject to the requirement in 1989; MMS production reports for 1989 are included in the record for this appeal.

The regulations in 30 CFR Part 216 were intended to provide a means of cross-checking production and sales data under a comprehensive accounting and auditing system developed by MMS in response to concerns about, <u>inter alia</u>, the lack of ability within the Department to verify production data submitted by operators. <u>See, e.g.</u>, 51 FR 8168 (Mar. 7, 1986); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757 (1988); H.R. Rep. No. 859, 97th Cong., 2d Sess. (1982).

during 1987 and 1988. The tribal and MMS reports are entirely consistent with each other. Appellant's 1989 report to BLM shows different, in some cases markedly different, production figures from those shown in the tribal production data and MMS sales data.

The record indicates that BIA relied on the tribal and MMS data and that it considered the figures in appellant's report to BLM inaccurate. See December 10, 1990, Memorandum to Files from Chief, Minerals Section, Albuquerque Area Office. In deciding whether BIA reasonably relied on the tribal and MMS data, in preference to appellant's 1989 data, the Board takes into consideration that: (1) appellant was the source of information for all three reports; (2) appellant submitted consistent reports to the Tribe and MMS; and (3) appellant did not, before the Area Director, and does not now contend that it erred in reporting production to the Tribe or that the Tribe erred in recording it. Indeed, appellant has put forth no challenge in this appeal to the accuracy of the data relied upon by BIA.

Further, appellant has acknowledged that the wells on the leases did not produce every month. In its July 28, 1989, letter to BLM, at pages 1-2, appellant stated:

> [I]t is necessary to vent gas in order to produce the wells; so in order to conserve gas pending their inclusion in the adjoining Canada Ojitos unit, they are produced only part time. We consider the wells as being "on" and "off" production for any given month. During "off" months a pumper ordinarily will run the equipment for a few hours on one, or possibly two, days during the month just to keep the machinery lubricated and operating; and may recover a few barrels of oil in so doing - but for practical producing considerations, the well is "off" to conserve gas.

> When these wells are included in the Canada Ojitos Unit, the unit's pipeline systems will be extended to collect the gas and reinject it in the unit. The wells will then be produced continuously.
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> Although the well on the 408 lease would not be considered a "paying, well" under the present method of operation; it could very well be a useable well once the Jicarilla lands are brought into the unit; so the well has not been plugged, but is being held for future use under unitization.

In its July 16, 1990, letter to BLM, concerning leases 200 and 403, appellant repeated the first two paragraphs of this statement.

For the reasons discussed, the Board accepts the tribal and MMS data as accurate and finds that it was reasonable for the Area Director to rely on it. This data supports the Area Director's conclusions, quoted above, concerning the lack of production during certain months in 1987 and 1988. It shows that as to lease 200, there was no production for a 3-month period in 1987 and for two 3-month periods and one 2-month period in 1988; as to lease 403, there was no production for a 7-month period in 1987, and two 2-month periods and one 3-month period in 1988; and, as to lease 408, there was production in only 1 month i.e., November 1988, during the entire 2-year period.

In its filings with the Board, appellant gives no explicit reasons for the periodic shut-ins. Although it asserted in its July 28, 1989, and July 16, 1990, letters to BLM that it shut in the wells to conserve gas, it makes no such assertion before the Board. 11/ In fact, that assertion

11/ The Board has held that, under certain circumstances, where a lessee shuts in a well in the reasonable belief that a shut-in is necessary to appears to be contradicted by certain contentions appellant makes in this appeal, specifically its contention that "continuous" production would not benefit the Tribe. 12/ Moreover, in this part of its argument, appellant appears to concede that it shut in the wells for the purpose of reducing its operating costs. 13/

Appellant's reason for shutting in the wells would clearly be relevant under the body of law appellant urges the Board to adopt. Under that body of law, the question of whether a cessation of production is “permanent,” resulting in expiration of the lease, or “temporary,” not resulting in expiration, is determined by, inter alia, the reason for the cessation. While mechanical and production breakdowns appear to be commonly recognized as resulting in temporary cessations, cessations from other causes are not so consistently accepted as temporary. See, e.g., 3 Williams and Meyers, Oil and Gas Law § 604.4 (1991); Hemingway, Law of Oil and Gas 291-304 (2d. ed. 1983); 32 Rocky Mtn. Min. L. Inst. § 14.06 (1986). Appellant has

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fn. 11 (continued)
avoid waste or damage to the trust property, such as would be caused by an oil spill, the lease does not expire. Duncan Oil, Inc. v. Acting Navajo Area Director, supra.

12/ Appellant contends that the same amount of overall production is obtained by periodically shutting in the wells as would be obtained from continuous production. It has not, however produced any evidence to support this contention and thus has failed to show that "continuous" production would not benefit the Tribe.

From the production reports included in the record, it clearly appears that gas production from appellant's wells increases as oil production increases. Accordingly, it appears that, if oil production would be the same by either production method, as appellant now contends, so too would be gas production. By making its present contention appellant appears to have abandoned its earlier assertion that it shut in the wells to conserve gas.

13/ Appellant states at page 23 of its opening brief: "Operating the wells only one out of three months significantly reduces operating expenses to the lessee with no adverse effect on the lessor."

not cited any authority for the proposition that shut-ins for the purpose of reducing operating costs are recognized as temporary under this body of law. Accordingly, appellant has failed to show, even under the body of law it relies upon, that its shut-in periods should be deemed temporary.

Moreover, whether or not appellant's "objective" and "subjective" tests should be applied to Indian leases in other circumstances, their application to leases which have been shut in is problematical. Use of appellant's "objective" test, for instance, would result in the dilemma described in the Area Director's July 23, 1990, memorandum, quoted at footnote 5, supra. 14/ A lease with minimal production might be able to "pass" this test, if shut in for part of the time period studied, simply because operating costs are negligible during the shut-in period. 15/ While low revenues, when accompanied by low operating costs, might be entirely satisfactory from the operator's perspective, they are presumably less so from the perspective of the Indian landowners. In fact, this kind of "on and off" operating method would appear, on its face, to be detrimental to the right of the Indian landowners to receive the maximum benefit from their trust property. 16/

14/ The Area Director wrote in reference to BLM's manner of making paying-well determinations. From the few documents in the record concerning those determinations, it appears that BLM employed a test similar to appellant's "objective" test, without regard to cessations of production.

15/ Other problems with these tests are illustrated by this case. For instance, how is the appropriate time period for determining paying quantities to be arrived at? Is it proper to allow the operator to choose the time period, as BLM appears to have done here? How are the operator's operating costs to be verified? It appears that, in this case, BLM did not require verification.

These are matters that could, perhaps, be addressed in regulations.

16/ As noted in footnote 12, appellant failed to show that this operating method was not harmful to the Tribe's interest. The burden was on appellant to make such a showing.

As the Board stated in Mobil, 18 IBIA at 330, 97 I.D. at 223, quoting from Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 386, 387 (10th Cir. 1982), "'As a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues'; and [the Secretary] 'must take the Indians' best interests into account when making any decision involving leases on tribal lands.'" Under this trust duty, it is incumbent upon Departmental officials to ensure that tests such as appellant advocates, if applied to leases of Indian lands, are applied with controls sufficient to protect the rights of the Indian landowners.

Within the parameters of this trust duty, there would appear to be room to moderate the harsh effects of the IMLA lease expiration provision. It has been recognized, for instance, that the parties to an oil and gas lease of Indian land may accomplish this by including appropriate language in the lease. See Mobil, 18 IBIA at 328 n.9, 97 I.D. at 221-22 n.9. 17/ So too, the parties might agree upon a lease modification to accommodate a lessee's changed circumstances. In these cases, control is maintained by the requirement that both BIA and the Indian lessor agree to the terms of the lease or lease modification.

17/ Another example of a lease provision modifying the standard lease term appears in the lease at issue in Farmers & Merchants Bank of Tryon, Oklahoma v. Muskogee Area Director, 21 IBIA 106, 108 (1991):

"[I]f, while this lease is being held by production alone, as stipulated above, the well or wells thereon shall cease to produce for any cause, lessee with the consent of the Secretary of the Interior, shall have the period of one hundred and twenty (120) days from the stopping of production within which * * * to attempt to restore production."

Further, under the rulemaking authority in 25 U.S.C. § 396d (1988), BIA could promulgate regulations either incorporating or providing a role for tests for "paying quantities" and/or other aspects of the body of law applicable to non-Indian oil and gas leasing, with such limitations as would be required under the overriding principles of Federal Indian law. At present however, no such regulations are in place.

The ultimate control is, of course, the IMLA itself. The Board holds that, with respect to oil and gas leases governed by the IMLA, in the absence of regulations providing otherwise, appellant's tests are not appropriately applied where the leases have been periodically shut in to reduce operating costs and where no permission for this method of operation has been given by BIA or the Indian landowner. Accordingly, under Mobil appellant's leases have expired by their own terms.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Albuquerque Area Director's December 14, 1990, decision is affirmed. 18/

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

18/ Appellant's request for oral argument is denied.